No. 3513

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

American Merchant Marine Insurance Company of New York (a corporation),
Appellant,

vs.

H. G. Tremaine, S. L. Buckley and John Doe Buckley, doing business under the firm name and style of Buckley-Tremaine Lumber Company,
Appellees.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

Statement of the Case.

This cause arises upon an appeal taken by American Merchant Marine Insurance Company of New York from a decree made in the court below dismissing its first amended complaint praying reformation in equity, upon the ground that it did not state a cause for equitable relief (Tr. 36, 37).

Appellant was plaintiff in the court below and appellee was one of three parties defendant sued as copartners. For the sake of simplicity, the

terms "plaintiff" and "defendant" will be used in this brief to describe appellant and appellee respectively, unless the context indicates otherwise.

The original complaint (Tr. 1-12) was attacked by a motion to dismiss (Tr. 14, 16), which was confessed by plaintiff (Tr. 16) but at the same time leave to amend was sought and obtained (Tr. 17) and, within the time limited by the court, plaintiff duly filed its first amended complaint (Tr. 17-31). Nothing turns upon the pleadings prior to the first amended complaint and they need not be further considered.

The amended complaint was likewise attacked by a motion to dismiss (Tr. 31, 33), and, after hearing (Tr. 33, 34), the motion was granted (Tr. 34, 36). Thereafter, plaintiff having declined to plead further, a decree was entered dismissing the first amended complaint with prejudice (Tr. 36, 37), to which an exception was duly noted and allowed (Tr. 37). Immediately thereafter this appeal was taken and perfected.

The purpose of the suit is to reform a contract of marine insurance entered into in the City of Seattle, Washington, between plaintiff as insurer and a copartnership composed of H. G. Tremaine, the appellee, F. L. Buckley, and John Doe Buckley, doing business under the firm name and style of Buckley-Tremaine Lumber & Timber Company. The contract in suit was executed in the name of Buckley-Tremaine Lumber Company, and the firm

name was thus designated in both the original and first amended complaints.

The original complaint named only two partners as defendants, H. G. Tremaine, the appellee, and F. L. Buckley, erroneously described as S. L. Buckley. At the time of the filing thereof, plaintiff did not know of the existence of any other partner, but during the framing of the first amended complaint, plaintiff learned that there was a third partner and joined him therein as an additional partner defendant under the name of John Doe Buckley, his true name being unknown to plaintiff.

The motion to dismiss the original complaint and also the motion to dismiss the first amended complaint was made by defendant H. G. Tremaine only. Up to the time when the decree was rendered, it proved impossible to obtain personal service upon the other two defendant partners named in the first amended complaint. Neither of them have made any appearance in the suit.

The issue involved in this appeal is solely a question of law, namely, the sufficiency of the first amended complaint. As an aid to the proper understanding of this issue and for the purpose of serving the convenience of the court, we shall summarize the allegations of the first amended complaint (Tr. 17-31).

After alleging the corporate character of the plaintiff and its qualification to do business in

Washington, the complaint describes the personnel of the partnership and sets up the jurisdictional allegations. It then states the facts which are substantially as follows:

> On October 3rd, 1919, the defendant partners made a written application for insurance on a cargo of lumber in the sum of $7,875. Plaintiff accepted the application for $4,875 and its acceptance was endorsed upon the application. The contract of insurance thus effected provided that the scow which was to carry the lumber should sail from Craig, Alaska, during the month of October, 1919. This contract, consisting of the application and the acceptance of plaintiff endorsed thereon, is commonly called a cover note or cover slip, and is embodied in Exhibit "A" of the amended complaint (Tr. 24, 25).
>
> There is a universal and long established custom among underwriters and purchasers of insurance that when insurance is sought by a purchaser, the latter prepares an application in writing setting forth the nature of the risk, the amount of insurance desired, and any special terms, conditions and warranties upon which the risk is predicated, which application is presented to the underwriter who rejects the same or accepts the risk in whole or in part, indicating his acceptance by endorsing on the said application over his signature, the portion of the amount of insurance applied for which

he is willing to accept. As soon thereafter as the same can be prepared, the underwriter executes to the applicant a formal policy or certificate of insurance embodying therein all the terms, conditions and warranties contained in the said cover note, and the policy or certificate delivered to the assured supersedes and takes the place of the cover note. This usage was known to the defendant and the application of October 3rd, 1919, was presented by the defendant to the plaintiff and accepted by the plaintiff in accordance therewith.

On October 6th, 1919, plaintiff, pursuant to the custom executed and delivered its certificate of insurance in the usual form to the defendant, which contained all the terms, conditions and warranties set forth in the cover note except that the scrivener employed by the plaintiff, by accident and mistake, failed to incorporate in the certificate the provision contained in the cover note to the effect that the voyage of the scow from Craig, Alaska, should commence in the month of October, 1919. Plaintiff's representative in Seattle executed and delivered the certificate to defendant under the belief that the certificate contained all the provisions of the cover note.

The defendant accepted the certificate under a like belief, or knowing that the certificate did not contain the said omitted provision, and that

the same had been omitted by accident and mistake and without the knowledge of plaintiff and its representative, failed to disclose the omission to plaintiff.

The omitted provision constituted a material express warranty by defendants materially and substantially affecting the rights and obligations of plaintiff, and by reason of the said omission, the certificate failed to express the contract of insurance between the parties and in order to express such contract, it should contain the omitted provision.

The above constitute the facts alleged in the first amended complaint upon which the plaintiff's right to reformation is predicated. It is plaintiff's contention that the facts show either a material mutual mistake, or a material mistake of plaintiff coupled with knowing and fraudulent acquiescence therein by defendants, in either of which cases the certificate should be reformed.

This position is tacitly conceded by defendant because his whole case against the sufficiency of the first amended complaint is based upon plaintiff's failure to allege compliance with Sec. 31 of Chapter 49 of the Laws of Washington for 1911, which reads as follows:

"Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made

a part of the insurance contract, and the insurance company making such insurance contract, unless as otherwise provided by this act, shall deliver a copy of such application with the policy to the assured, and thereupon such application shall become a part of the insurance contract, and failing so to do it shall not be made a part of the insurance contract" (Laws 1911 Chap. 49, Sec. 31, page 195).

It is admitted that the first amended complaint does not alleges that a copy of the cover note was delivered to the assured with the policy, but it is the contention of plaintiff that this statute has no application to the facts alleged in the first amended complaint and that therefore no allegation of compliance therewith is necessary.

Specification of Errors Relied Upon and Intended to be Urged.

Plaintiff specifies the following as errors relied upon and intended to be urged for the reversal of the decree herein, that is to say:

ERROR OF THE DISTRICT COURT IN DISMISSING THE FIRST AMENDED COMPLAINT (Assignment of Errors, Tr. 37-41).

This error is the only one raised by the record but it has been assigned in several different forms in order that all questions involved in the issue may be brought to the attention of the court. The eight assignments of error simply present the reasons why and the particulars in which the decree of the

court below is erroneous. These reasons are as follows:

I. Disregarding for the moment the Washington statute, the first amended complaint states facts sufficient to constitute a cause of suit in equity entitling plaintiff to the relief of reformation in some appropriate form. This is the substance of the first assignment of error (Tr. 37, 38).

The remaining assignments of error merely set forth the reasons why the Washington statute is inapplicable to the case and why there is no need to allege compliance therewith in a complaint for reformation which is otherwise sufficient.

II. The Washington statute has no application to suits in equity for reformation, whereas the statute as construed and applied by the court below has abolished the doctrine of reformation in contracts of marine insurance.

(1) The statute is merely a legislative extension of the "parol evidence rule". This rule has no application to suits in equity for reformation and consequently the statutory extension can not be applied where the rule itself is inapplicable. This is the theory upon which the fourth and fifth assignments of error are framed (Tr. 39, 40).

(2) The Washington statute does not in terms apply to the case at bar. This point is made by the third assignment of error (Tr. 39).

III. The Washington statute has no application to contracts of marine insurance, for;

(1) Such contracts are governed by the general maritime law of which the law of marine insurance is a part, and the requirement of the statute is not and never has been any part of the law of marine insurance.

(2) The general maritime law of the United States, including as part thereof, the law of marine insurance, is binding upon all courts, whether of admiralty, common law or equity.

(3) It is beyond the power of the state of Washington to change the law of marine insurance, and hence the statute should not be construed as affecting such a change by making its terms applicable to marine insurance, or, if no other construction is possible, the statute must be held unconstitutional to that extent.

These points are embraced within the scope of the second assignment of error (Tr. 38, 39).

IV. The Washington statute has no application in the equity courts of the United States. The jurisdiction of such courts can neither be expanded nor contracted by state legislation, and the jurisdiction to reform contracts cannot be abridged by a state statute which in effect prescribes a rule of evidence and thereby abolishes the equitable remedy of reformation. This is the point raised in the eighth assignment of errors (Tr. 40, 41).

Brief of Argument.

1. DISREGARDING THE WASHINGTON STATUTE, THE FIRST AMENDED COMPLAINT STATES FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF SUIT IN EQUITY ENTITLING PLAINTIFF TO THE RELIEF OF REFORMATION IN SOME APPROPRIATE FORM (First Assignment of Error, Tr. 37, 38).

The only question before the court on this appeal is one of law. Does the first amended complaint state facts sufficient to constitute a cause of suit for reformation? There are no questions of fact in the case. The facts are the allegations contained in the complaint, all of which are admitted by the motion to dismiss, which, under the new equity rules, takes the place of and operates with the same effect as the former demurrer.

Equity Rules of the Supreme Court, Rule 29.

The facts alleged show that the cover slip constituted a definite concluded contract of marine insurance, upon which, had no subsequent certificate been issued, an action for a loss within the contract could have been maintained.

Kerr v. Union Marine Insurance Co., 124 Fed. 835;
Ibid., 130 Fed. 415;
26 Cyc. 569, note 88.

The facts also show that the contract was to be followed by and merged in a certificate, which was intended by the parties to embrace all the stipulations of the existing contract. They show that a material term, condition and warranty contained in the original contract was omitted from the certi-

ficate by accident and mistake with the result that the certificate does not express the contract of the parties.

Under all the authorities these facts are sufficient to entitle plaintiff to reformation of the certificate.

> "One of the most common classes of cases in which relief is sought in equity on account of a mistake of facts is that of written agreements either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended, sometimes it contains more, and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent. In all such cases if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties."
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> *1 Story's Equity Jurisprudence,* (14th Ed.) Sec. 224.

> "Reformation is appropriate, when an agreement has been made, or a transaction has been entered into or determined upon, as intended by all the parties, interested, but in reducing such agreement or transaction to writing, either through the mistake common to both parties, or through the mistake of the plaintiff accompanied by the fraudulent knowledge and procurement of the defendant, the written instrument fails to express the real agreement or transaction. In such a case the instrument may be corrected so that it shall truly represent the agreement or transaction actually made or determined upon according to the real purpose and intention of the parties."
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> *2 Pomeroy's Equity Jurisprudence,* (3rd Ed.) Sec. 870.

"There are certain principles of equity applicable to this question, which, as general principles, we hold to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement."

Mr. Justice Washington, speaking for the court in the case of

Hunt v. The Administrators of Rousmaniere, 1 Peters 1, at page 11; 7 L. Ed. 27 at 32.

Andrews v. Essex Co., 1 F. C. 374;

Hearne v. Equitable Safety Ins. Co., 11 F. C. 6300;

North American Ins. Co. v. Whipple, 18 F. C. 10,315;

Oliver v. Mutual Commercial Marine Ins. Co., 18 F. C. 10,498;

Western Assurance Co. v. Ward, 75 Fed. 338;

Providence Steam Engine Co. v. Hathaway Mfg. Co., 79 Fed. 512;

Trenton Terra Cotta Co. v. Clay Shingle Co., 80 Fed. 46;

New York Life Ins. Co. v. McMaster, 87 Fed. 63;

Equitable Safety Ins. Co. v. Hearne, 20 Wall. 494; 22 L. Ed. 398;

5 Joyce on the Law of Insurance, Sec. 3509 and following;
17 The Laws of England by Lord Hallsbury, page 403, Sec. 788 and notes;
26 Cyc., pages 569, 570 and 613.

Aside from the attack based upon the effect of the Washington statute, defendant in his motion to dismiss (Tr. 31-33) challenges the sufficiency of the first amended complaint upon the following grounds which will be discussed in the order enumerated:

1. Exhibit "A" of the first amended complaint (Tr. 24) was preliminary to and an application for insurance as evidenced by the certificate or policy set forth in Exhibit "B" of the complaint (Tr. 25).

2. The application did not make any of its statements or representations therein contained warranties.

3. The omitted phrase sought to be made a warranty has no place in the policy.

4. The certificate or policy did not make the application a part thereof or provide that any of the terms, phrases or language used in the application should become a warranty in the policy or form a part thereof.

5. The complaint fails to show a mutual mistake and plaintiff is estopped by delivery of the certificate or policy to assured and the acceptance thereof by the assured.

6. There is an adequate remedy at law.

7. The first amended complaint shows upon its face that it is a different cause of action against different parties defendant than those named in the original complaint.

The first four points can be grouped and discussed as one. It is true that defendant made an application, but after it was accepted by plaintiff and the acceptance was endorsed thereon, the so-called application was no longer a mere unaccepted continuing offer, which is precisely what an application is in legal effect, but became a contract, commonly called a cover note or cover slip. Such indeed is the precise allegation of paragraph III. of the first amended complaint, the material portions of which read as follows:

> "* * * the defendant made application in writing for insurance in the sum of seven thousand eight hundred and seventy-five dollars ($7,875.00) * * *. Thereafter the plaintiff insured the said lumber in the sum of four thousand eight hundred and seventy-five dollars ($4,875.00) * * *, and as evidence of its acceptance of the said application and of the effecting of the insurance, the plaintiff endorsed in writing its acceptance * * * upon the said application. A copy of the application of the defendants with the acceptance of the plaintiff endorsed thereon (commonly called the cover note or cover slip) is hereunto annexed, made a part hereof and marked Exhibit 'A'."

These are allegations of offer and acceptance from which one and only one legal conclusion can

be drawn, namely, that the cover note constitutes a contract; and these allegations of fact are admitted by the motion. Throughout the entire motion to dismiss (Tr. 31-33) much emphasis is placed upon the so-called application, doubtless in support of defendant's attempt to bring the case within the scope of the Washington statute; but defendant entirely overlooks the fact that as a matter of law, the original application became by acceptance thereof merged in the cover note as a contract, and that thereafter there was no application but a completed contract.

Plaintiff's entire case rests upon the fact that there was a preliminary but nevertheless binding contract between the parties, and because a part of that contract, intended by both parties to be incorporated in the certificate, was omitted therefrom by accident and mistake, plaintiff brought this suit. Probably this first point is preliminary and intended to lay a foundation for the objection based on the Washington statute. In any event, however, it is merely a restatement of paragraph III of the first amended complaint, and a specific admission of the fundamental fact upon which the case of plaintiff rests.

It is also true that the application did not designate any of its statements as warranties, and neither did the certificate make the application a part thereof, or provide that any part of the application should be a warranty. But the complaint alleges in paragraph IV a universal usage to the effect that

all of the terms and provisions of the cover note were to be embodied in the certificate, and that the dealings between the parties were had in accordanc with and pursuant to this usage. The motion admits the usage and that the parties acted with reference thereto.

The motion is a specific admission that all the terms, conditions and warranties of the cover note were *intended by both parties* to be incorporated in the certificate, which is the foundation of the plaintiff's case. It is not necessary to determine at this time what the effect of incorporation therein is, or whether parts of the certificate can be construed as representations merely or as warranties. The sole purpose of the suit is to get the terms, and all the terms, of the cover note into the certificate. Once this is done, there is no need for this court in this suit to construe the certificate as reformed.

Defendant's first four objections amount to nothing but the denial of facts alleged in the complaint and admitted by the motion itself.

With regard to the point that the complaint does not allege facts showing a mutual mistake, it is sufficient to say that the allegations of the mutual mistake as set forth in paragraphs VI, VII and VIII of the first amended complaint (Tr. 21, 22) are well and sufficiently pleaded under the authorities.

> "The allegations that the terms of the contract were agreed upon, that they were to be put in writing by plaintiff, that both plaintiff

> and defendant executed the writing under the mistaken impression that it did conform to the prior verbal agreement, fully meet the objection that the bill states merely a case of unilateral mistake in making a proposition" (Brown, District Judge, in *Providence Steam Engine Co. v. Hathaway Mfg. Co.*, 79 Fed. 512 at 516).

Furthermore the first amended complaint is a bill with a double aspect, and it is alleged in paragraph VII thereof that either both plaintiff and defendant believed the certificate did contain the omitted provision, or that defendants, knowing of the omission and that it was made by accident and mistake on the part of plaintiff and without its knowledge, failed and neglected to disclose the fact of such omission to the plaintiff. This is a sufficient allegation of unilateral mistake by plaintiff coupled with fraud on the part of defendant. The word "fraud" does not appear in the complaint, but the facts upon which fraud is predicated are sufficiently pleaded.

> "There is, however, one equivalent which may be substituted for mutual mistake. Common honesty forbids a man to obtain or perfect rights with knowledge that the other party is laboring under a mistake. Equity will not permit him to reap the fruits of his dishonest silence. It will not avail him to say that the error ceased to be mutual because he discovered the mistake which he failed to correct. Such conduct amounts to fraud. If, then, by reason of mistake on the one hand, and knowledge of the error on the other, the writing fails to express the prior bargain correctly, equity

will reform just as readily as if there had been mutual mistake'' (*23 Har. Law Rev.,* 618, 619).

Essex v. Day, 52 Conn. 483;
Roszell v. Roszell, 109 Ind. 354; 10 N. E. 114;
Welles v. Yates, 44 N. Y. 525;
James v. Cutler, 54 Wis. 172; 10 N. W. 147;
Venable v. Burton, 129 Ga. 537; 59 S. E. 253.

As far as any estoppel arising out of the delivery of the certificate is concerned, there can be none under the facts pleaded. The entire transaction from first to last was intended by both parties to be in harmony with the custom set out in paragraph IV of the first amended complaint (Tr. 20). That custom contemplated the subsequent delivery of a certificate which should embrace all the terms, conditions and warranties of the cover slip, and the delivery of a certificate which through mistake omitted a material term, condition or warranty of the cover slip cannot work an estoppel. If such were the rule, the whole doctrine of reformation would be reduced to a theoretical right incapable of enforcement, for in every case there is a delivery of an erroneous instrument, out of which the necessity for reformation arises.

The defendant also urges that there is an adequate remedy at law. It is true that under some circumstances there may be some remedy at law. Reformed procedure in many states permits of equitable relief in law actions. This situation always obtains in any reformation suit, but the remedy

at law is not as complete, thorough going and effective as in equity. The jurisdiction to reform is essentially equitable and the fact that some degree of relief may also be obtained in some law courts is not sufficient to deprive a court of equity of its ancient and indisputable jurisdiction of a reformation suit. The remedy at law which will oust a court of equity of jurisdiction means a remedy known to the common law at the time the constitution was adopted, and not some remedy created by statute passed subsequent to that time. Procedural statutes permitting equitable defences in law actions are all of recent date.

Western Assurance Company of Toronto v. Ward, 75 Fed. 338;

Tayloe v. Insurance Company, 9 How. 390; 13 L. Ed. 187;

Kilbourne v. Sunderland, 130 U. S. 505; 32 L. Ed. 1005.

The last of the minor objections raised by defendant to the first amended complaint is that it shows upon its face that it is a different cause of action against different parties defendant than those named in the original bill of complaint. Coupled with this objection in the motion is a statement that defendant H. G. Tremaine appears specially for the purpose of objecting to the jurisdiction of the court to require him to plead or answer the first amended complaint without service of process thereunder.

The theory upon which a defendant may at one and the same time enter a general appearance and subject himself to the jurisdiction of the court for the purpose of attacking the sufficiency of the complaint, and then limit his appearance in the manner attempted by this defendant is beyond our comprehension. The defendant H. G. Tremaine is and always has been subject to the jurisdiction of the court since the service of the original subpoena upon him, and it is now too late for him to make a special appearance. Furthermore, it is submitted that the reason why he seeks to make a special appearance is not well founded.

The equity rules specifically provide for amendments at any and every stage of the proceedings, and the allowance thereof is wholly within the discretion of the court, and is not subject to review. *Equity Rule 19.*

> "These rules, 19 and 28, covering the subject of amendments to the bill, supplant former equity rules 28, 29, 30, 45 and 46, and their apparent effect is to greatly broaden the power of the courts in permitting amendments at any or all stages of the proceeding.
>
> An examination of the decisions on this point under the former rule, however, discloses the fact that the courts have always considered that the power of a court of equity to grant amendments is wholly discretionary, and that in furtherance of justice they will not consider themselves hampered by the particular rules in court."
>
> *Montgomery's Manual of Federal Procedure* (2nd. Ed.), page 345.

Furthermore, the cause of action stated in the original complaint is precisely the same cause of action as is stated in the first amended complaint. The purpose of both is to procure reformation of the same instrument upon the same basic facts, and the first amended complaint is nothing but a more detailed and explicit statement of the identical cause of suit set up in the original complaint. It is against the same partnership and the only new party added by the first amended complaint is an additional partner whose existence was unknown to the plaintiff at the time the original complaint was filed.

Further discussion of this branch of the case can serve no useful purpose, for the sufficiency of the first amended complaint cannot be successfully challenged on any of the grounds thus far considered. As a pleading, the complaint responds to every test, either of principle or authority, and must, independently of the Washington statute, constitute the statement of a sufficient cause of suit in equity, justifying the relief of reformation in some appropriate form.

II. THE WASHINGTON STATUTE HAS NO APPLICATION TO SUITS IN EQUITY FOR REFORMATION, WHEREAS THE STATUTE AS CONSTRUED AND APPLIED BY THE COURT BELOW HAS ABOLISHED THE DOCTRINE OF REFORMATION IN CONTRACTS OF MARINE INSURANCE.

(1) The statute is merely a legislative extension of the "parol evidence" rule. This rule has no application to suits in equity for reformation and consequently the statutory extension can not be applied where the rule itself is inapplicable. This is the theory upon which the fourth and fifth assignments of error are framed (Tr. 39).

The real question at issue in this case is the scope and effect of the Washington Statute. This is the sole question considered by the court below in his decision, and the one upon which the case was expressly decided.

The statute has already been quoted (brief page 6) and need not be repeated. It provides in substance that when a contract of insurance is construed, the court must look solely to the terms and conditions of the policy itself, unless, (1) the contract is made pursuant to a written application; (2) the application is intended to be made a part of the contract, and (3) a copy of the application is delivered to the assured with the policy. Then, and only then, the application becomes a part of the contract and may be considered with the policy for the purposes of construction. By necessary implication nothing other than a written application can ever be considered, and then only when made in accordance with the statute.

The learned district judge said in his decision (Tr. 35), after quoting the exact language of the statute, "the statute must be complied with, or the application cannot be considered", and sustained the motion to dismiss.

The only authority adduced by the court in support of his contention is *Joyce on Insurance,* Sec. 190, and cases cited. We have carefully examined that section and all of the cases referred to in the notes and have been unable to discover a single authority which even remotely justifies application of the statute to a reformation suit. We have also made an extended search for cases in point in every jurisdiction where similar legislation has been adopted, and our researches have not disclosed a single case in which such a statute has been applied to defeat a suit for reformation otherwise well founded. There are literally hundreds of cases in the books involving the construction and application of these statutes for they have been adopted quite generally throughout the United States, but all are practically without exception, actions at law on the policy. None involve reformation in equity.

Hence it cannot be said that the decision of the court below finds any support in the authorities.

Neither is it justified on principle. The statute in question is nothing but a legislative extension of the "parol evidence" rule. This rule is in force in every common law jurisdiction, either as the result of statutory enactment or judicial decision. Nothing

in our law is more fundamental than this rule, that the terms of a written instrument cannot be altered, varied or contradicted by parol evidence. The effect of the rule is to preclude proof of any antecedent agreement or understanding between parties which would alter, vary or contradict the terms of their subsequent formal written agreement. The word "parol" means extrinsic for it includes both verbal and written evidence. The formal and final written instrument is supposed to express the entire contract, and if it were not for the parol evidence rule the value and certainty of written agreements would be destroyed.

But the parol evidence rule has no application to a suit for reformation. The sole purpose of such a suit is to alter, vary and contradict the terms of the written instrument, and the justification is that the written instrument does not express the real contract which the parties actually made. Unless parol, that is, extrinsic evidence were admissible in equity, it would be absolutely impossible to reform any document, because all the evidence which will prove that the document does not express the real contract must necessarily be extrinsic, and it must, if the suit is to be effective, result in altering, varying and contradicting the terms of the written instrument. To assert, therefore, that the parol evidence rule is applicable to a suit in equity for reformation is to deny the very existence of the entire doctrine of reformation. As Lord Hardwicke observed in the case of *Baker v. Paine,* 1 Ves. Sen.

457; 27 Eng. Rep. 1140, "How can a mistake in an agreement be proved but by parol evidence?"

It is well settled that parol or extrinsic evidence is admissible in the federal courts of equity in a reformation suit.

Andrews v. Essex Co., 1 F. C. 374;
Hearne v. Equitable Safety Ins. Co., 11 F. C. 6300;
North American Ins. Co. v. Whipple, 18 F. C. 10,315;
Oliver v. Mutual Commercial Marine Ins. Co., 18 F. C. 10,498;
Western Assurance Co. v. Ward, 75 Fed. 338;
Providence Steam Engine Co. v. Hathaway Mfg. Co., 79 Fed. 512;
Trenton Terra Cotta Co. v. Clay Shingle Co., 80 Fed. 46;
New York Life Ins. Co. v. McMaster, 87 Fed. 63;
Equitable Safety Ins. Co. v. Hearne, 20 Wall 494; 22 L. Ed. 398.

The Washington statute was framed to correct an evil which was beyond the reach of the parol evidence rule. It is well known that the legislation was aimed at the custom of life insurance companies to put in their blank forms of application long and intricate questions and statements to be answered or made by the applicant, printed usually in very small type and the relevancy and materiality not always apparent to the inexperienced. The subsequent policy when issued usually contained a

statement that the application was made a part thereof. As the result of this practice, the insurance company was always able to rely upon the application as a part of the contract because it was made so by reference. The application therefore was not extrinsic evidence but an integral part of the contract, and there was no way to exclude it under the parol evidence rule. This resulted in much injustice and led to the adoption of the Washington and other similar statutes.

The effect of the statute is to extend the salutary principle which is at the foundation of the parol evidence rule. That rules provides that no extrinsic evidence shall be introduced, meaning thereby anything that is not expressly included in the final instrument, but it does not apply to matters incorporated by reference. The statute goes one step further. It adopts the parol evidence rule bodily by declaring that the contract shall be construed solely according to the terms and conditions of the policy or final instrument. Had it stopped there it would have amounted merely to a statutory enactment of the parol evidence rule. But its chief aim was to exclude evidence of matters which were made a part of the contract merely by reference contained in the policy, and for the understanding of which it was necessary to examine other instruments. The desired result is accomplished awkwardly and by implication. After providing that the terms and conditions of the policy shall constitute the sole criterion for determining what

the contract is, an exception to the rule is created. The exception provides that under certain circumstances, namely, when a copy of the application is delivered with the policy, the former as well as the latter shall be a part of the contract of insurance. In brief, the statute excludes everything which will alter, vary or contradict the terms and conditions of the policy, except a written application, and then only when a copy thereof is delivered with the policy.

We have already seen that the parol evidence rule cannot be applied to reformation suits without abolishing the doctrine. The same result will be accomplished by applying to such suits the statutory extension of that rule.

If the statute applies, it will operate to exclude all evidence of whatever character that will prove mistake and thus alter, vary or contradict the policy. The only evidence extrinsic to the policy which is permitted by the statute is the application when a copy thereof is delivered with the policy.

It must be remembered that the sole purpose of this suit for reformation suit is to make the certificate speak the real contract of the parties as expressed in the cover slip, and thus enable the insurer, if sued upon the unreformed certificate, to deny that he made any such contract as is expressed therein, and, in support of his denial, to introduce the reformed certificate as evidence of what the real contract was.

The court below says that a marine insurance certificate cannot be reformed unless a copy of the cover note was delivered with the certificate. In other words, no term omitted from the cover slip can by reformation be added to the certificate, unless both were delivered together.

But had both been delivered together, the cover slip would have been a part of the contract just as much as the certificate. By force of the statute the term contained in the cover slip would have been part of the contract in spite of the fact that it was omitted from the certificate. The sole purpose of the reformation suit would have been accomplished by the operation of the statute, and the suit would have been needless.

On the other hand, when, as in the case at bar, a copy of the cover slip is not delivered with the certificate, the latter cannot be reformed. As the need for reformation will never exist if both instruments are delivered together, and can arise only in the case where no copy of the coverslip has been delivered, it follows that the court below has abolished the doctrine of reformation in cases of insurance by applying the statute to suits of that character.

We submit, therefore, that if the parol evidence rule itself is not applicable in a suit in equity for reformation, the statutory extension of that rule must likewise be inapplicable under the same circumstances. The logic is the same in both cases,

and should lead to the same result in either. There is no escape from the conclusion that any application of the statute to reformation suits necessarily results in the abolition of the entire doctrine of reformation in cases of insurance contracts.

(2) The Washington Statute does not in terms apply to the case at bar. (Third Assignment of Error—Tr. 39).

In the discussion of this point particular attention should be paid to the precise language of the statute. In the first place, the statute is a rule of construction, for it provides that every contract of insurance shall be *construed* according to the terms and conditions of the policy. This appears to be a statutory declaration that no extrinsic evidence shall be introduced for the purpose of construing the policy. The suit at bar neither involves nor requires any construction of the policy. The problem is not to determine the meaning of any of the terms of a complete written instrument, but to embody in that instrument all the terms which the parties intended to include therein. No question of construction can arise until the problem presented by this suit has first been solved. Therefore, the operation of the statute is plainly excluded by its own terms.

III. THE WASHINGTON STATUTE HAS NO APPLICATION TO CONTRACTS OF MARINE INSURANCE FOR:

(1) Such contracts are governed by the general maritime law of which the law of marine insurance is a part, and the requirement of the statute is not

and never has been any part of the law of marine insurance.

(2) The general maritime law of the United States, including as part thereof the law of marine insurance, is binding upon all courts, whether of admiralty, common law or equity.

(3) It is beyond the power of the State of Washington to change the law of marine insurance, and hence the statute should not be construed as affecting such a change by making its terms applicable to marine insurance, or, if no other construction is possible, the statute must be held unconstitutional to that extent.

These points are embraced within the scope of the second assignment of error (Tr. 38, 39).

Throughout the discussion of this point, it must not be forgotten that prior to the issuance of the certificate which the first amended complaint seeks to reform, the cover slip constituted a valid and binding contract of marine insurance between the parties. Had a loss occurred prior to the issuance of the certificate plaintiff would have been liable on the contract in the law courts.

But not only was the cover slip a contract, it was a maritime contract, and as such if a loss had occurred before the certificate was issued, plaintiff would have been liable therefor in admiralty, as well as at common law.

Kerr v. Union Marine Ins. Co., 124 Fed. 835; Ibid., 130 Fed. 415.

Inasmuch therefore, as it is a maritime contract, it is governed not by the law of Washington, the place where it was made, but by the general maritime law. The same thing is true of the certificate, that is, it was a maritime contract and governed in all particulars by the general maritime law and not by the law of the State of Washington.

These principles are clearly established by the case of *Union Fish Company v. Erickson,* 248 U. S. 308; 63 L. Ed. 261. This was a suit in admiralty upon a verbal contract made in California for the employment of libellant as a skipper upon a fishing voyage in Alaskan waters. It was objected by the respondent that the contract was governed by the law of California where it was made and that it was void because it was not in writing, as required by the Statute of Frauds of California, but the court held that it was a maritime contract governed by the general maritime law and that the local statute of the place where made had no application.

Mr. Justice Day, speaking for the court, said:

> "In entering into this contract, the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made" (248 U. S. 313; 63 L. Ed. 263).

It is submitted that this case is a conclusive authority that the Washington statute does not apply to the facts alleged in the first amended complaint. Both the cover slip and the certificate are maritime instruments executed by the parties in contemplation of the general maritime law, and the local statute has no application to the case.

Nor is the Union Fish Company case distinguishable because of the fact that it arose in admiralty, for the general maritime law governs in every court, whether it be of admiralty, common law or equity. Such is the precise holding of the Supreme Court in the case of *Chelentis v. Luckenbach Steamship Co.,* 247 U. S. 372; 62 L. Ed. 1171.

This was an action at law by an injured seaman to recover damages by way of idemnity. Under the general maritime law he was entitled only to maintenance and cure, whereas under common law he could recover full indemnity. The court held that upon the facts presented in the case, the seaman's rights, in whatever court that they might be asserted, were such as were prescribed by the laws of the sea.

It must therefore be taken as settled by the decisions of the Supreme Court that there is a general maritime law of the United States which is binding upon all courts when dealing with maritime matters.

The conclusion is irresistible that in the light of the foregoing principles it was never the intention of the Legislature of the State of Washington, that

this statute should apply to contracts of marine insurance. The court below, however, has held that the statute does apply to such contracts, a construction of the statute which necessarily renders it unconstitutional because legislation with respect to the general maritime law is not within the legitimate scope of state legislative power.

Southern Pacific Co. v. Jensen, 244 U. S. 205; 61 L. Ed. 1086.

In the Jensen case, the majority of the Supreme Court says that state legislation with respect to martime matters is invalid "if it works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations" (244 U. S. 216; 61 L. Ed. 1098). A majority of the court were of opinion that the Workmen's Compensation statute of the State of New York was state legislation of this precise character and the statute was held unconstitutional insofar as it purported to cover maritime matters.

The business of marine insurance is world-wide, involving transactions and risks on all the waters of the earth. It is in no sense a local or municipal matter. To hold that the State of Washington may prescribe the methods by which such contracts shall be made and to punish infractions of its statutes by forfeiture of valuable and universally recognized rights, is to invite every state to indulge in similar legislation.

The chaotic condition resulting from such legislation is precisely what a majority of the Supreme Court had in mind when the opinion in the Jensen case quoted with approval the following remarks of Mr. Justice Bradley in *The Lottawanna,* 21 Wall. 558; 22 L. Ed. 654:

> "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction' * * *. One thing, however, is unquestionable: the Constitution must have referred to a system of laws co-extensive with and operating uniformly in the whole country. It certainly could not have been in the intention to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of commercial character affecting the intercourse of the States with each other or with foreign States." (21 Wall. 574; 22 L. Ed. 662.)

Marine insurance is one of the most ancient branches of the general maritime law and the methods by which it is effected, though often beyond the ken of laymen, are well known to the shipping world. They have undergone practically no modification in the last two hundred years. The course of dealing between insurers and those purchasing in-

surance has crystalized into a universal usage which is set forth in the fourth paragraph of the first amended complaint (Tr. 20). To permit state legislatures to tinker with this ancient and settled usage pursuant to which contracts of marine insurance have been made, construed and enforced in the four corners of the earth, strikes at the very heart of the shipping world. Insurance is of the essence of every maritime transaction and of all sea borne commerce, and in no department of maritime law is there greater necessity for harmony and uniformity.

Inasmuch, therefore, as the contract between the parties in this suit is a maritime contract which is governed by the general maritime law and not by the local law, it is entirely competent for the parties to contract with reference to the universal and settled usages of marine insurance. It is alleged that they did so contract and the allegation is admitted by the motion.

The local law has nothing to do with the case. The Washington Legislature doubtless knew the limitations upon its power, and therefore the statute should not be given a construction which necessarily renders it unconstitutional. The court below has not only attributed to the legislature an intention to vitiate the settled marine insurance law of the ages, but has declared that such a result can be lawfully accomplished. It is respectfully submitted that his decision can be supported neither by principle nor

authority. If the statute can be given no construction other than that placed upon it by the learned District Judge, it is plainly void.

IV. THE WASHINGTON STATUTE HAS NO APPLICATION IN THE EQUITY COURTS OF THE UNITED STATES.

The jurisdiction of such courts can neither be expanded nor contracted by state legislation, and the jurisdiction to reform contracts cannot be abridged by a state statute which in effect prescribes a rule of evidence and thereby abolishes the equitable remedy of reformation. This is the point raised in the eighth assignment of error (Tr. 40, 41).

It is well settled that the jurisdiction of the Federal Courts depends exclusively upon the Constitution of the United States and appropriate legislation of Congress. No state can contract or expand the jurisdiction as thus established, nor prescribe rules of procedure or evidence applicable in the federal courts.

By Sec. 721 of the Revised Statutes, Congress has to a limited extent adopted the laws and practice of the several states for the government of the federal courts when sitting purely as courts of law.

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply" (R. S. Sec. 721).

But this statute applies only to courts of law. Courts of equity and admiralty are not included. As far as courts of equity are concerned, their jurisdiction and practice is governed by that of the English High Court of Chancery at the time the Constitution was adopted. It might perhaps be competent for Congress to change the situation as it has done by Sec. 721, with respect to the law courts, but suffice it to say it has never done so. Clearly, the state legislatures have no power in the premises.

Burt v. Keyes, 4 F. C. 2,212;
Lamson v. Mix, 14 F. C. 8,034;
Davis v. James, 2 Fed. 618;
Strettell v. Ballou, 9 Fed. 256;
Mississippi Mills v. Cohn, 150 U. S. 202; 37 L. Ed. 1052.

It must be conceded, therefore, that if the Legislature of Washington had enacted a statute which provided in terms that no federal court of equity shall hereafter entertain a suit to reform an insurance policy, the statute would be void. Reformation of instruments is an ancient head of equity jurisdiction and as courts of equity the federal courts have exercised the power since the foundation of our government.

It will be recalled that at an earlier point in this brief, the argument was advanced that the Washington statute could not be applied to suits in equity without abolishing the doctrine of reformation itself.

It follows, therefore, that the application of the statute to reformation suits commenced in the federal equity courts, must of necessity, completely deprive them of the power to reform insurance contracts. The statute will operate directly upon the jurisdiction of the federal equity courts, and will in effect, destroy an essential part thereof.

If such a result could not be accomplished by the Washington Legislature directly, which must be conceded, it cannot be accomplished indirectly. If the Washington Legislature can prescribe rules of evidence applicable to the federal equity courts, the necessary effect of which must be to exclude any and all evidence upon which their equitable jurisdiction of reformation can be exercised, it has destroyed the jurisdiction itself.

Should such a statute as the one under consideration be held applicable to the federal courts of equity, then there is no limit to the power of state legislatures with respect to federal equity jurisdiction. By prescribing rules of procedure and evidence the entire equity jurisdiction could ultimately be completely abolished.

In view of these considerations, it is unthinkable that the Washington Legislature ever intended the statute to apply to reformation suits, or to suits of that character in the federal courts. If such was the intention the statute is clearly unconstitutional.

Courts have ever been reluctant to construe statutes in such fashion as to render them void, espec-

ially when any other construction is possible. Yet this is precisely what the court below has done. Its decision in effect declares that the Washington Legislature has precluded a federal equity court, sitting in Washington, from reforming a marine or any insurance policy made in that state.

The mere statement of the proposition demonstrates the error into which the learned District Judge has fallen, and emphasizes anew the conclusion that his decree should be reversed.

In conclusion it is respectfully submitted that, independently of the Washington statute, the first amended complaint constitutes a sufficient statement of a cause of suit for reformation in equity, and that the statute, if properly construed has no application to the case, or if applicable in terms and by necessary construction is unconstitutional and void.

The decree should be reversed and the cause remanded to the District Court for further proceedings and with instructions to deny defendant's motion to dismiss the first amended complaint.

Dated, San Francisco,
September 1, 1920.

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